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In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellants' opening brief demonstrated that certain compulsory provisions[1] of the Michigan Agricultural Marketing and Bargaining Act[2] (the "Michigan Act") stand as an obstacle to the accomplishment of the full objectives of the Federal Agricultural Fair Practices Act[3] (the "Federal Act"). A finding of preemption under this test requires a determination of the *objectives* of the Federal Act and an assessment of the *effects* of the Michigan Act on those objectives. *See Perez v. Campbell*, 402 U.S. 637, 650-52 (1971).

The language of the Federal Act discloses three objectives. First, the Act declares a farmer's[4] right to voluntarily join a cooperative and protects that right against interference by "handlers", which the Act defines to include both agricultural purchasers and cooperatives.[5] Second, the Act declares a farmer's right to refrain from joining a cooperative and protects that right from interference by purchasers and cooperatives. Third, the Federal Act protects the right of purchasers to deal directly with farmers and not cooperatives. The Federal Act's legislative history makes these objectives even more evident. The Federal Act developed from a one-dimensional bill, designed only to foster cooperatives, to a statute balancing the rights of cooperatives, independent farmers, and purchasers. (App. Br. 13-17).[6]

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1. The challenged sections of the Michigan Act are set forth at page 5 of appellants' opening brief.

2. Mich. Comp. Laws §§ 290.701-.726 (Supp. 1983).

3. 7 U.S.C. §§ 2301-2306 (1973).

4. The Federal Act calls farmers, ranchers and other growers of foodstuffs "producers". 7 U.S.C. § 2302(b).

5. 7 U.S.C. § 2302(a).

6. Appellants' opening brief is referred to as (App. Br.). The briefs of appellees and their amicus are referred to as follows: Brief for Appellee Agricultural Marketing and Bargain-

(Continued on following page)

The Michigan Act has a destructive effect on important goals of the Federal Act. Once a cooperative is accredited under the Michigan Act, each farmer in the bargaining unit is bound by the cooperative's price and other terms of trade and must pay a service fee, even if the farmer does not desire to join the cooperative. The Michigan Act forbids negotiation between individual farmers and purchasers and requires purchasers to negotiate only with the cooperative. The Michigan Act gives the accredited cooperative total control of the market: The cooperative is the exclusive agent of all farmers in the unit, whether or not they consent, and all purchasers must negotiate with the cooperative or buy nothing in the State of Michigan. The Michigan Act thereby destroys the non-consenting farmer's right to refrain from joining a cooperative and the purchaser's right to deal with farmers and not cooperatives.

Appellees respond by ignoring two of the objectives of the Federal Act and by minimizing the Michigan Act's destructive effects. They argue that the Federal Act has a single goal—to prohibit *handlers* from interfering with the right to join or not to join a cooperative. According to appellees, the Michigan legislature was free to abolish the underlying federal right not to join cooperatives, because the Federal Act did not expressly forbid the states from doing so. Further, say appellees, the California Prorate Act was "existing" when the Federal Act was passed and contains similar coercive features. This requires automatic approval of the Michigan Act, according to appellees, as does the state action doctrine of *Parker v. Brown*. Finally, appellees contend that Congress could

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Footnote continued—

ing Board - (Brd Br.); Brief of Appellee MACMA On The Merits - (MACMA Br.); Brief For The American Farm Bureau Federation As Amicus Curiae In Support Of Appellees - (AFB Br.).

not have meant to confer rights upon agricultural purchasers in section 2304, because such rights would be inconsistent with the right to form cooperatives. As shown below, appellees' arguments do not save the Michigan Act from preemption.

I. THE MICHIGAN ACT FRUSTRATES CONGRESS'S GOAL OF GUARANTEEING FARMERS A FREE CHOICE.

A. The Objective Of The Federal Act Is Not Limited To Preventing Private Acts Of Coercion.

The Federal Act, as finally passed, safeguards a farmer's right to decide whether or not to join a cooperative. "The objective of the bill is to protect the producer in the exercise of a free choice." S. REP. No. 474, 90th Cong., 1st Sess. (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. The declaration of policy in section 2301, the protection of the right in section 2303, and the Act's legislative history all support this conclusion. (See App. Br. 19-23).

Appellees argue that the goal of the Federal Act is not to create or protect the right to join or not to join a cooperative. Like the Michigan Supreme Court, appellees say that the Federal Act sought only to prevent coercive conduct by handlers designed to interfere with a farmer's decision. (Opinion, J.S. App. A10; MACMA Br. 22).[7] Congress's "concern was purely with harassing

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7. The Michigan Supreme Court cited a letter from the Secretary of Agriculture to support this contention. (Opinion, J.S. App. A11-A12). The letter, reproduced in S. Rep. 474, is worthless as an indication of Congress's ultimate objectives. It was written in response to an earlier version of the bill, which did not contain the critical amendments later added in the Senate. This is clear from the letter's date and its reference to superceded versions of sections 4 and 5 of the bill. 1968 U.S. Code Cong. & Ad. News at 1874-1875.

tactics that handlers and processors had employed", say appellees. (AFB Br. 10). Appellees premise this argument on the fact that the Federal Act only expressly prohibits "handler" interference with the right to join or not to join a cooperative. On this basis, Michigan claims the power to destroy the underlying right not to join a cooperative, because the Federal Act does not explicitly prohibit state destruction of this right. (Opinion, J.S. App. A10).

At the heart of appellees' argument is the notion that Congress was concerned not with the underlying economic right to join or not to join a cooperative, but only with prohibiting acts of coercion by private individuals. That notion is not supportable. As demonstrated in appellants' opening brief (pp. 19-23), the economic right of farmers to sell individually or through a cooperative was Congress's paramount concern. "We made of the legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative." 114 CONG. REC. 7451 (1968) (Statement of Chairman Poage).

Appellees' analysis confuses the objectives of Congress with the means that Congress employed to meet those objectives. The objective of the Federal Act is "to protect the producer in the exercise of a free choice". As it often does, Congress implemented that goal by regulating private conduct. By forbidding handlers from interfering with a farmer's decision to join or not to join a cooperative, Congress protected the right of free choice. Congress's goal was not simply to outlaw acts of coercion. Forbidding handler interference was only the means by which Congress safeguarded the underlying economic right to join or not to join a cooperative.

Appellees' analysis misses the constitutional issue in this case. The question is not whether Michigan has vio-

lated the Federal Act. Only agricultural purchasers and cooperatives can violate the Federal Act. Nor is the issue whether the Federal Act expressly forbids the states from destroying the rights safeguarded by federal law. The Federal Act does not, but it need not. The Supremacy Clause already does so. The question is whether the Michigan Act, by destroying the rights protected in the Federal Act, "stands as an obstacle to the accomplishment and execution of the full objectives" of the Federal Act. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Appellees' analysis would sanction state nullification of many federal statutes. Congress often regulates the relationship between parties by prohibiting certain conduct. By preventing one individual from acting in a certain way towards another, Congress creates federal rights. States may not impair those rights, even though Congress has not expressly forbidden state interference. *Hill v. Florida*, 325 U.S. 538 (1945).

If appellees were correct, a state statute outlawing cooperatives would not conflict with the Federal Act. The right to join cooperatives is protected in the same section, by the same language, as the right not to join. 7 U.S.C. § 2303(a). If the states are free to abolish the right not to join, they must be free to abolish the right to join cooperatives. After all, the Federal Act merely proscribes coercive handler conduct; it does not expressly forbid the states from outlawing cooperatives.

The truth is that the Federal Act creates federal rights. "[I]n this bill there are rights clearly spelled out—that they have the right not to join if they so choose." 114 CONG. REC. 7449 (1968) (Remarks of Rep. Latta). Congress created these rights by prohibiting "actions designed to interfere with a producer's free choice to belong to an association." H.R. REP. No. 824, 90th Cong., 1st Sess. 5

(1967). The objective of Congress was not merely to prevent bad acts, but to preserve the underlying economic right to join or not to join a cooperative.

B. The Michigan Act Destroys A Farmer's Right To Deal Free Of Cooperatives.

The Michigan Act frustrates Congress's clear objective of protecting a farmer's right of free choice concerning cooperative membership. The Michigan Supreme Court conceded that the Michigan Act would conflict with such a federal right: "Were we to agree that § 2304, or any provision in [the Federal Act], was meant to affirmatively *create or protect* rights of private dealing between individual producers and processors, we would agree that [the Michigan Act] must fall, because, plainly, [the Michigan Act] conflicts with this result." (Opinion, J.S. App. A8). In place of Congress's goals, the Michigan Act substitutes its own objective of safeguarding the cooperative against competition, by granting the cooperative total dominance over non-consenting farmers.

Appellees nevertheless argue that there is no conflict between the Michigan Act and a federal right not to join a cooperative. Appellees point out that the Michigan Act also "protects" a farmer's right not to join a cooperative. (MACMA Br. 14). This contention is seriously misleading in two respects. First, the Michigan Act "protects" that right only from purchaser interference. It does not prohibit cooperatives from interfering with that right. (§ 4 (2)). Second, the Michigan Act protects only the bare associational right not to be a formal cooperative member; it allows cooperatives to force upon non-consenting farmers all economic aspects of cooperative membership. As shown in appellants' opening brief, Congress was concerned with a farmer's economic right to trade in a free

market, and not with hollow associational rights. (App. Br. 19-23).

Appellees then draw a false analogy to state public employment statutes, which protect an employee's associational right not to "join" a union while providing for compulsory representation and financial support. (MACMA Br. 15-17). There is no inconsistency between a right not to join and forced representation and support, say appellees, because many state legislatures see none. This contention misses the point. The question is not whether forced representation conflicts with a state-created right not to join a cooperative, but whether it conflicts with a federal right not to join.[8] The question, then, is what Congress, not the state legislature, meant when it used the word "join".

When a cooperative applies for and is granted accredited status, it coerces all non-consenting farmers to "join", within the meaning of section 2303. (App. Br. 19-23). The Michigan Act does not require cooperatives to seek accreditation; unaccredited cooperatives may represent consenting farmers, but they lack coercive power over the unwilling. The only consequence of accreditation is that the cooperative obtains the authority to coerce non-consenting farmers and purchasers. That a "democratic" vote supports the cooperative is irrelevant. The Federal Act does not establish a scheme of majority rule; it protects the rights of all farmers, including those in the minority.

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8. For the same reason, appellees' analogy to agency shops is unenlightening. The issue is not whether agency shops are inherently good or bad, but whether they conflict with federal law. Agency shops are permissible in private employment, because Congress has expressly sanctioned union security arrangements as an exception to the right not to join a union. (App. Br. 24-26). They are impermissible in the agricultural area, because the Federal Act forbids forced representation and contains no exceptions.

Appellants Ferris Pierson and Dukesherer Farms are not the only farmers who have lost their right to a free choice. Of the 433 members of the asparagus bargaining unit in 1974, only 236 consented to representation by MACMA; 197 did not. The non-consenting farmers produced nearly 7 million of the 17 million pounds of asparagus sold in the unit. In 1975, 135 asparagus farmers in a unit of 332 did not consent. In 1976, 138 of 334 did not consent. In 1977, 135 of 347 did not consent.[9]

In an effort to deemphasize this wholesale abrogation of federal rights, the Board points out that MACMA has chosen to fix only minimum, and not maximum, prices and terms of trade. (Brd Br. 9-10). But this Court has long held that the fixing of minimum and maximum prices is equally pernicious. Both "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951); *accord, United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). This is especially true in agriculture, where the setting of an unreasonably high minimum can price a farmer out of the market. (*See, e.g.*, Trial Tr., pp. 114-144). Moreover, as the Board admits, the Michigan Act allows the setting of maximum prices as well. (Brd Br. 9).

The challenged sections of the Michigan Act all operate to grant accredited cooperatives total dominance over hundreds of non-consenting farmers. The Michigan Act accomplishes this goal by restraining non-consenting farmers and their trading partners, the purchasers. The act directly binds non-consenting farmers to the terms

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9. Answers to Interrogatories to Defendant Board, signed June 7, 1977, Answer 1(m). Similarly, 288 of the 586 growers in the processing apple bargaining unit did not consent to representation. *Id.*; *see* Trial Tr. pp. 109-110.

dictated by the cooperative. (§§ 10(1), 13; Opinion, J.S. App. A6). It places a reciprocal restraint on purchasers by prohibiting them from negotiating with non-consenting farmers. § 4(1)(h). Even if the Michigan Act did not directly compel farmers to abide by the cooperative's terms of trade, section 4(1)(h) creates the same result, indirectly but just as effectively. By forbidding purchasers from negotiating with non-consenting farmers, section 4(1)(h) deprives those farmers of rights granted by the Federal Act.

Section 4(1)(g), which compels purchasers to bargain with cooperatives, has the same destructive effect on the federal rights of non-consenting farmers, even in the absence of provisions directly compelling non-consenting farmers to adhere to the cooperative's terms. If non-consenting farmers are not legally wedded to the cooperative, then they are in competition with the cooperative for the business of purchasers. In the free market system envisioned by the Federal Act, the cooperatives and independent farmers are free to use economic weapons, but not coercion, in their contest to attract purchasers. But the Michigan Act gives cooperatives a powerful weapon against the independent farmer. The act requires purchasers to negotiate with the cooperative; the independent farmer has no power to compel purchasers to negotiate with him.

Worse yet, if a purchaser does not accede to an accredited cooperative's demands, the Michigan Act empowers the cooperative to exclude the purchaser from the market, by preventing both cooperative members *and* non-consenting farmers from selling their crops to that purchaser. In the words of the statute, "the affected producers may elect, *as represented by the association*, not to sell, directly or indirectly, any quantity of the

agricultural commodity during the marketing period", if the purchaser does not agree to a contract with the cooperative. § 15 (emphasis added). The purchaser has the same choice: either come to terms with the cooperative (voluntarily or through binding arbitration), § 16, or buy none of the commodity in the State of Michigan, § 15. If a purchaser does not agree with the cooperative's terms and either the cooperative or purchaser elects to cease negotiations, the non-consenting farmer may not sell to that purchaser. The compulsory bargaining provisions thereby grant the cooperative the power to select the non-consenting farmer's customers for him.

None of the other state bargaining acts cited by appellees goes so far. No other statute appoints the accredited cooperative as exclusive agent for non-consenting farmers. For example, Minnesota's law expressly provides that the accredited cooperative "may not assess, bargain for, or claim to represent those producers who choose not to be represented by the association. Minn. Stat. § 17.694 (7) (1982).

Nor does any other state impose upon purchasers a duty to agree with the cooperative, or pain of expulsion from the state. The Minnesota Act, for example, imposes only the duty to negotiate in good faith. Minn. Stat. § 17.697(1). If the purchaser cannot agree with the cooperative, the cooperative may elect not to sell the purchaser any of its commodity. § 17.697(3)(c). The act does not prevent the purchaser from buying from non-member farmers. The California Act is similar. It imposes only a duty to bargain in good faith. Cal. Agric. Code § 54431(e) (Supp. 1983). It does not give cooperatives the power to bar purchasers from buying any quantity of produce in the state in the absence of agreement.

The Michigan Act is unique in authorizing cooperatives to totally dominate non-consenting farmers.[10] Michigan grants cooperatives the ultimate power to isolate non-consenting farmers from their customers, the agricultural purchasers. This power fundamentally conflicts with the goals of the Federal Act. As a result, the challenged provisions of sections 4(1)(g), 4(1)(h), 10, and 13 of the Michigan Act are void because of their destructive effect on the federal rights of non-consenting farmers.

II. THE MICHIGAN ACT IS NOT SAVED BY THE DOCTRINE OF PARKER v. BROWN.

Appellants' opening brief showed that the coercion of non-consenting farmers by accredited cooperatives does not constitute "state action" under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The Michigan scheme lacks the essential element of active state supervision. It authorizes cooperatives to impose price and other terms upon non-consenting farmers, in violation of the Federal Act. For this reason, principles of federalism that may militate against a finding of preemption of true state action do not apply in this case. (App. Br. 27-30).

Appellees respond by creating the simulacrum of state supervision. They argue that the binding arbitration provisions of the Michigan Act (§ 16) satisfy the state supervision requirement. (Brd Br. 35-36). Section 16 provides that if a cooperative and a purchaser do not agree (and neither elects to opt out of negotiations), binding arbitration will settle the dispute. Through this process, allege appellees, the state exercises the required "active supervision" of the prices set by the cooperative.

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10. Accordingly, a decision against the validity of the Michigan Act does not necessarily imperil the laws of other states.

This contention will not withstand analysis. The evidence at trial showed that asparagus prices had never been established by arbitration. There had been only one arbitration for the asparagus unit, and that involved grade, not price.[11] The record therefore discloses that the "supervision" of asparagus prices is non-existent. There had been only three price arbitrations under the Act: apples (1975 and 1976) and cabbage (1977). These infrequent arbitrations are no substitute for the active and continuous state supervision required by this Court's decisions.

Michigan's random system contrasts sharply with those regulatory schemes that have qualified as state action. In *Parker v. Brown*, state officials reviewed and approved the terms of all marketing plans. 317 U.S. at 352. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), a state board reviewed each dealer protest and ultimately sustained only one out of 117. 439 U.S at 110 n. 14. Under the Michigan Act, "supervision" by arbitration is the rare exception, not the rule. *See United States v. Borden Co.*, 308 U.S. 188 (1939).

Even considering the random arbitration process as supervision, it is private, not state, supervision. The arbitrators are private individuals, appointed by the parties. (§ 16(2)). In contrast to *Parker v. Brown*, the decision makers are not state officials. The California Prorate system was imposed by a sworn commission, appointed by the governor and confirmed by the senate. 317 U.S. at 346. This Court has since reaffirmed that state action must be taken by "state officials". *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 (1976); *see Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Although

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11. Answers to Interrogatories to Defendant Board (First Set), signed June 7, 1977, Answer 3; Answers to Interrogatory Defendant Board (Second Set), signed July 28, 1977, Answer 9.

the Court of Appeals may theoretically review the arbitration award, none has ever been appealed. (MACMA Br. 30). In the Michigan Act's twelve-year history, therefore, no state official has ever supervised the setting of a price.

The binding arbitration procedure provides no more state supervision than a state law that requires competitors to agree on prices and requires binding arbitration if they cannot. In neither case does the state displace the market system with its own system of active state regulation. Michigan's scheme provides no safeguard against the inappropriate subordination of federal policy to state policy. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977). It is not due any deference on state action grounds.

III. THE MICHIGAN ACT IS NOT SAVED BY FALSE ANALOGY TO THE CALIFORNIA PRORATE ACT.

The Federal Act, enacted in 1968, provides that it does not preempt "existing" state law. 7 U.S.C. § 2305 (d). As the Michigan Supreme Court conceded, section 2305 does not save the Michigan Act, which did not exist in 1968. (Opinion, J.S. App. A5). The state bargaining laws that did exist in 1968 were much like the Federal Act, containing none of the compulsory features of the Michigan Act.[12] Appellees nevertheless argue that the California Prorate Act[13] existed in 1968 and contained

12. See Appellants' Brief In Opposition To Motions To Dismiss, pp. 6-7, for a discussion of the state bargaining acts reviewed by the Senate Committee before passage of the Federal Act.

13. The original California Prorate Act, 1933 Cal. Stat. 1969, was amended in 1967 and its title was changed to the Agricultural Producers Marketing Law, Cal. Agric. Code §§ 59501-60015 (1983). The amendments did not change the purpose or substance of the act. The references that follow are to the amended act.

compulsory elements "similar" to the challenged aspects of the Michigan Act. They conclude that the Michigan Act's compulsory features must therefore be valid. (MACMA Br. 8-12; Brd Br. 23-26).

The analogy to the California Prorate Act lacks substance. The Prorate Act has nothing to do with the right to join or not to join a cooperative. The Prorate Act provides for the orderly marketing of certain commodities. It does so by the imposition of marketing plans that restrict the quantity of a commodity that farmers may produce, regulate the flow of commodities to market, or establish grade and quantity requirements. §§ 59655, 59657. The act also provides for the establishment of equalization or stabilization pools, into which all affected farmers place a certain percentage of their commodity. §§ 59801-59814. The basic goal of the statute is to minimize the adverse effects of a market surplus. § 59801; *see Parker v. Brown,* 317 U.S. 341, 355 (1943). In other words, the statute allows the creation of quotas and commodity pools to prevent gluts on the market. *See* § 59512.

Both Congress and the State of California recognize the difference between marketing order laws (like the Prorate Act) and cooperative bargaining laws. California found it necessary to pass in 1961 and periodically amend its bargaining act, Cal. Agric. Code §§ 54401-54463 (1983), despite the existence of the Prorate Act on its books since 1933. Similarly, Congress passed the Federal Act and has considered other bargaining bills despite the existence of a comprehensive federal marketing order law. Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-610 (1980). The only similarity between the two types of laws is that they both affect farmers.

The analogy to the Prorate Act is misleading in another important respect. Contrary to appellees' asser-

tion, the compulsory aspects of the Prorate Act are not "fundamentally the same" as those in the Michigan Act. State officials, not private parties, issue California marketing orders. This was true of the original Prorate Act, *see Parker v. Brown*, 317 U.S. 341 (1943), and it remains true today, Cal. Agric. Code §§ 59655-57. In an effort to create the contrary impression, appellees emphasize that a California marketing program "is established" or "implemented" only after a vote of farmers. (Brd Br. 24; MACMA Br. 10). Appellees fail to say that it is the Director of Agriculture, not the farmers, who establishes the program, after reviewing specific economic factors and holding hearings on the proposed program's terms. §§ 59655-59; 317 U.S. at 352.

That the state may coerce a farmer to adhere to a marketing order does not sanction other types of coercion. The imposition of a marketing order is valid because it conflicts with no federal law. The unsupervised coercion of non-consenting farmers by accredited cooperatives is invalid, because it conflicts with the objectives of a specific federal law regulating cooperatives. Whatever else a farmer may be forced to do, he may not be forced to join a cooperative, because Congress has forbidden it.

IV. THE MICHIGAN ACT UNDERMINES THE FEDERAL ACT'S OBJECTIVE OF PRESERVING A COMPETITIVE MARKETING SYSTEM, BY FORCING PURCHASERS TO NEGOTIATE WITH COOPERATIVES.

Certain challenged sections of the Michigan Act force agricultural purchasers to negotiate with accredited cooperatives and prevent them from negotiating with individual farmers. (§§ 4(1)(g), 4(1)(h), 13(1)). These provisions are void because they obstruct the federal rights

of non-consenting fa. ners. (See Section I.B. above). These sections are void on an independent ground as well. They frustrate the Federal Act's objective of preserving a free market system in which purchasers may not be compelled to deal with cooperatives.

Appellants' opening brief traced the evolution of the Federal Act from a bill protecting only cooperatives to a statute balancing the rights of cooperatives with the pre-existing rights of agricultural purchasers. Congress expressed that balance in section 5 of the Act (7 U.S.C. § 2304), in which it disclaimed any intent to prohibit normal dealing or to "require a handler to deal with an association of producers." By enactment of section 5, this balance became national policy. (App. Br. 31-37).

Appellees answer by claiming that section 5 merely disclaims Congress's own intent to impose mandatory bargaining, but has no effect on the states. (Brd Br. 40-45). Appellees' argument glosses over the important point: Congress deliberately refrained from imposing upon purchasers a duty to bargain with cooperatives. If Congress rejected mandatory bargaining "on the merits, and not because of any desire to leave the states free to adopt it", then a state-imposed duty to bargain conflicts with federal policy. *See UAW v. O'Brien*, 339 U.S. 454, 458 (1950).

Congress rejected mandatory bargaining on its merits. Congress believed that the ability to choose one's customers and suppliers was fundamental and should not be abridged, except to the extent of prohibiting discrimination. As the bill's co-sponsor Senator Lausch stated, "this bill does not at all deprive the purchasers or what are called handlers in the bill, of the right to choose from whomever they wish to buy. That is their constitutional

right." *Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture & Forestry*, 90th Cong., 1st Sess. 14 (1967). Section 5 makes this judgment clear, by expressly protecting the purchaser's right to deal with individual farmers and not cooperatives. "[The Federal Act] is not intended to impair the right of handlers and producers to deal with each other on an individual basis, which is preserved in section 5." H.R. REP. No. 824, 90th Cong., 1st Sess. 4 (1967).

Appellees argue that Congress could not have meant what it said, because a right not to deal with cooperatives would conflict with a farmer's right to designate the cooperative as his exclusive agent. (MACMA Br. 31-46). Appellees may see an inconsistency, but Congress did not. "[N]othing in the bill prevents a handler from refusing to deal with a bargaining association notwithstanding its designation by a producer in a contract as his exclusive bargaining agent." H.R. REP. No. 824, 90th Cong., 1st Sess. 4 (1967).

This does not mean that a purchaser may insist upon dealing with a farmer who has *voluntarily* named a cooperative as his exclusive agent. To buy that farmer's crop, a purchaser must deal with the cooperative or look elsewhere for the commodity. The purchaser may have no practical choice except to deal with the cooperative, but the compulsion results from economic factors and the farmer's voluntary contract with the cooperative. The Federal Act did not intend to suspend either economic forces or the state law of contract. 7 U.S.C. § 2305(d).

Accordingly, appellants do not claim that purchasers have a right to deal with farmers who have *voluntarily* signed exclusive agency agreements with a cooperative. They claim only the right to deal with independent farm-

ers, who have not freely committed themselves to a cooperative, and the right to be free from compulsory bargaining with cooperatives. Section 5, and the federal policy that it expresses, protect both rights.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), cited by appellees, does not compel a different result. The *Exxon* Court refused to find preemption of a state law that conflicted with federal antitrust policy. If the "broad implications" of the antitrust laws were given full effect, the states would be crippled in their ability to govern. "For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the states' power to engage in economic regulation would effectively be destroyed." 437 U.S. at 133. As the Court has since made clear, *Exxon* requires that preemption be based not on general expressions of national policy but on specific statutes. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

This case presents none of the problems of *Exxon*. Unlike the antitrust laws, the Federal Act does not express sweeping principles that would cripple the states if applied uncritically. The Federal Act regulates a specific segment of society: farmers, cooperatives and purchasers. Its provisions concern only the right to deal, or not to deal, with or through cooperatives. Enforcement of the Federal Act's policies will not interfere with the states' ability to govern in other areas. Appellants invoke the provisions and policies of a specific federal statute, not general expressions of national policy. As the Court has recently made clear, federal policies arising from specific statutes continue to preempt conflicting state laws. *Southland Corp. v. Keating*, 52 U.S.L.W. 4131, 4134 (U.S. Jan. 23, 1984) (No. 82-500).

CONCLUSION

Appellees show a marked hostility to the Federal Act. They call the Federal Act "paradoxical", "ineffective" and "watered-down". (MACMA Br. 29, 43; AFB Br. 7). The Michigan courts share this disdain. The trial court identified voluntary cooperatives as one of the "problems" that the Michigan Act sought to remedy. (Opinion, J.S. App. A69). According to the trial court, voluntary cooperatives "did not work". (*Id.* at A70).

Despite appellees' criticisms, voluntary cooperative membership is the "supreme law of the land", U.S. CONST., art. VI, cl. 2, as are the other provisions of the Federal Act. The Michigan Act effectively repeals the Federal Act by making membership mandatory and forcing purchasers to negotiate with cooperatives. "A state statute so at war with the federal law cannot survive." *UAW v. O'Brien*, 339 U.S. 454, 458 (1950).

Respectfully submitted,

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